Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1999

THE CITY OF CONCORD,
Petitioner,

v.

NEIL S. HARDIN,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The former City Manager of the City of Concord, California sued the City and its former Mayor in federal District Court for sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* Title VII, which was amended by the Civil Rights Act of 1991 to permit trial by jury, excludes any "appointee on the policy making level" of a state or local government who is "not . . . subject to the civil service laws" from the definition of a covered "employee" entitled to bring a Title VII claim in federal court (the "Policymaker Exclusion"). Instead, the Civil Rights Act of 1991 directs that such Policymakers' discrimination claims be presented to the Equal Employment Opportunity Commission.

1. Is a Title VII claimant's status as an excluded Policymaker a question of law for the court, or a question of fact for the factfinder such that a federal jury trial would be required to determine whether the claimant had a right to jury trial in federal court?

2. Does a Title VII claimant's status as an excluded Policymaker divest the District Court of subject matter jurisdiction over the Policymaker's Title VII claims?

3. Did it violate the First Amendment to premise Title VII retaliation liability on nondefamatory public statements to the press by the Mayor and his supporters criticizing Plaintiff's official job performance, and on the City Council's failure to disagree with or censor that criticism as Plaintiff had demanded?

4. Did the City waive its First Amendment protections by acquiescing in a stipulation designed to effectuate the District Court's rulings against it on its motion in limine to exclude evidence and argument concerning the above-described criticism of Plaintiff on (among others) First Amendment grounds?

PARTIES TO THE PROCEEDING

1. City of Concord is the Petitioner here and was the Defendant below.

2. Neil S. Hardin is the Respondent here and was substituted as the Plaintiff in the Court of Appeals.

3. Byron Campbell was a Defendant in the District Court proceedings. Plaintiff's claims against Campbell were resolved prior to briefing in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

The City of Concord respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reprinted in the Appendix at App. A1-A4. The opinions of the District Court are unreported and are reprinted in the Appendix at App. A5-A46, A48-A49.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on October 16, 1998. App. A1-A4. The Court of Appeals denied the City of Concord's timely Petition for Rehearing on December 7, 1998. App. A47. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns the First Amendment to the United States Constitution; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*; and the Civil Rights Act of 1991, including the Government Employees Rights Act, 2 U.S.C. §§1201 *et seq.* Pertinent portions of the federal statutes involved are set forth verbatim in the Appendix at App. A94-A98. They include: 2 U.S.C. §§1202 and 1220, reprinted at App. A94-A95; 29 U.S.C. §630(f), reprinted at App.A96; and 42 U.S.C. §§2000e(f) and 2000e-5(f)(3), reprinted at App. A97-A98. Relevant portions of the California Government Code are reprinted in the Appendix at App.

A98-A99 and relevant portions of the Concord Municipal Code are reprinted in the Appendix at App. A99-A106.

STATEMENT OF THE CASE

A. Statement Of Facts.

Concord's municipal government. Concord, California, is a city of 114,000 located about 30 miles east of San Francisco. The City has a council-manager form of government that is common throughout the United States. 2A E. MCQUILLIN, MUNICIPAL CORPORATIONS §9.21 (3d ed. 1996) ("MCQUILLIN"). The citizens of Concord elect a five-member City Council that governs the City. CAL. GOV'T CODE §§36501, 36503. The Council is required to choose one of its members to serve as Mayor (*id.* §36801); the Mayor's authority is the same as the other Councilmembers', except that the Mayor presides at council meetings, and acts as the City's ceremonial head. *Id.* §§36802-03.

The Council appoints a City Manager, who is the chief executive officer responsible for managing the City's business. *Id.* §§34851, 34856; CONCORD MUN. CODE §§2206-08. Among other duties, the City Manager helps the Council fashion City policies, prepares the annual budget, and channels communication and direction from the City's political leaders to the hundreds of municipal employees serving the City's constituents. The City Manager "hold[s] office at the pleasure of the City Council," and can be removed from office in the Council's "uncontrolled discretion." CONCORD MUN. CODE §§2206(A), (B); *see also* CAL. GOV'T CODE §36506.

The election of Mayor Campbell, and the appointment of Plaintiff as City Manager. In November 1989, the City's voters elected Byron Campbell to a four-year term on the City Council; he was given the ceremonial position of Mayor for the next two years.

In 1990, the new Council appointed a new City Manager, Plaintiff Rita Hardin, on a 3-2 vote. Plaintiff

signed an at-will employment contract with the City and served as City Manager for the next 28 months. As illustrated by the closely divided vote that brought Plaintiff to her position, the City Council suffered profound political discord throughout Plaintiff's tenure. To make matters worse, Plaintiff and Campbell became entangled in what eventually became a very public power struggle over City administration, a struggle that eventually led to this lawsuit.

The sexual harassment allegations against Mayor Campbell. As City Manager, Plaintiff was responsible for investigating and responding to charges of sexual harassment of City employees. CONCORD MUN. CODE §§2208(A)-(C), (E), (K). Soon after Plaintiff became City Manager, she received reports that some female City staff were concerned about Campbell's inappropriately familiar behavior toward them. During the following year, Plaintiff took some steps to address this issue, but did not institute any investigation or other formal proceedings regarding the reports.

In October 1991, well over a year after Plaintiff's appointment, a former City intern filed formal harassment charges against Campbell. The City Council immediately hired an experienced harassment investigator, attorney Carol Stevens, to look into the charges. The following month, Campbell's two-year term as Mayor expired. He remained a member of the City Council until his four-year Council term expired in 1993.

The Stevens investigation quickly expanded to include other City employees' complaints. Plaintiff herself became one of the additional complainants, raising several incidents of inappropriately familiar touching that had occurred earlier in her tenure. After an extensive investigation, Stevens submitted a report to the City Council concluding that Campbell had indeed engaged in inappropriate conduct toward a number of City employees.

The City Council's censure and other remedial efforts. The Council promptly adopted a formal Resolution censuring Campbell, and imposing the strongest measures it

could to punish him and protect the City's employees from further harassment or retaliation. In addition to adopting the Resolution, every member of the City Council also publicly demanded Campbell's resignation. Campbell refused, calling the demands politically motivated.

In the months that followed, the public debate over the conduct of the City's affairs intensified. Campbell and Plaintiff both were often in the news. Numerous articles and letters to the editor appeared in local newspapers critical of Plaintiff's performance as City Manager. Plaintiff believed that Campbell was orchestrating these letters in retaliation for her role in his investigation and censure. She demanded that the other members of the City Council speak out in her support, and publicly praise her job performance. She also demanded that the Council investigate Campbell's role in the negative press coverage and letters to the editor, and put a stop to them. The Councilmembers declined to pry into the motives of the journalists or the letter-writers, or to try and stop the articles and letters critical of Plaintiff's job performance. They also declined to speak out on Plaintiff's behalf.

Plaintiff's resignation. Plaintiff abruptly left her job in September 1992, following a heated closed-session Council meeting in which she was criticized for mishandling the politically controversial appointment of a new City police chief. Plaintiff left the session and never returned to her job. A month later, she sent the City a letter of resignation blaming Campbell, and the City's failure to "protect" her from him, for the loss of her job.

B. Proceedings Below.

In April 1993, Plaintiff sued the City and Campbell in the United States District Court for the Northern District of California. She invoked the jurisdiction of the district court under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§2000e *et seq.*, and under 28 U.S.C. §1331 (general federal question jurisdiction) and §1367 (supplemental

jurisdiction). Against the City, Plaintiff's Complaint alleged sexual harassment, gender discrimination and retaliation in violation of Title VII and various state-law claims for discrimination, wrongful discharge, breach of contract, and misrepresentation. She asserted similar discrimination and retaliation claims against Campbell, as well as a defamation claim based on his public statements criticizing her job performance.

A five-week jury trial began in October 1994. The jury returned a verdict in favor of the City on all claims except her state-law claim for breach of the contractual covenant of good faith, as to which it awarded Plaintiff $75,000. In a separate verdict, the jury ruled in Campbell's favor on all the claims against him, including Plaintiff's defamation claim.

However, on Plaintiff's motion, the District Court overturned the verdict as against the weight of the evidence, and ordered a new trial on her claims for sexual harassment, retaliation and wrongful constructive discharge.[1] A second trial began in February 1996, and lasted seven weeks. The second jury returned a verdict against the City on all remaining claims, awarding $1,231,000 in damages. The jury also found Campbell liable for $65,000 in damages. Judgment was entered accordingly. App. A48. With attorneys' fees and costs, the judgment in Plaintiff's favor now stands in excess of $3.5 million.

After Defendants' post-trial motions were denied, Campbell and the City timely appealed the judgment to the United States Court of Appeals for the Ninth Circuit. Upon Plaintiff's death in February 1997, the Court of Appeals substituted her spouse, Neil Hardin, as appellee. Campbell settled Plaintiff's claims against him prior to briefing in the Court of Appeals, and is not a party to this Petition.

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[1]The District Court did not disturb the verdict in the City's favor on Plaintiff's other claims against it, or the verdict in Campbell's favor on Plaintiff's defamation claim. Plaintiff did not appeal those verdicts, and they are final.

The Ninth Circuit affirmed the judgment in a brief Memorandum Decision. App. A1. On the ground of waiver, it declined to address the merits of two key issues: (1) the District Court's lack of subject matter jurisdiction over Plaintiff's claims because of her status as "an appointee on the policy making level . . . [not] subject to the civil service laws of a State government" (42 U.S.C. §2000e(f)) (*see* Part I, *infra*); and (2) the judgment's improper premising of Title VII retaliation liability on speech and conduct protected by the First Amendment (*see* Part II, *infra*). The City's Petition for Rehearing and Suggestion for Rehearing En Banc was summarily denied. App. A47.

REASONS FOR GRANTING THE PETITION

This Petition raises important issues of federal law on which the lower federal courts are in conflict, each of which directly affects the democratic and political processes of state and local government.

The first of these questions concerns the scope, application and jurisdictional status of Title VII's "Policymaker Exclusion" (42 U.S.C. §2000e(f)) and parallel exclusions in several federal employment statutes. In 1991, Congress determined for the first time that high-level appointees of state and local governments ("Policymakers") would be protected by federal antidiscrimination law, but that their rights and remedies would be determined exclusively by a specialized administrative procedure before the EEOC, rather than by the federal jury trial available to most covered employees.

The Courts of Appeals have differed on whether a claimant's status as an excluded Policymaker is a question of law for the court or a question of fact for the factfinder. In this case, the Ninth Circuit concluded that the question was factual, and thus required a federal jury trial in order to determine whether the claimant had had a right to a federal

jury trial in the first place. Although the Tenth Circuit has ruled consistently with the Ninth (*see Anderson v. City of Albuquerque*, 690 F.2d 796, 800-01 (10th Cir. 1982)), three other Circuits disagree: The Sixth, Seventh, and Eighth Circuits all treat the applicability of the Policymaker Exclusion as a question of law to be decided by the court. *Americanos v. Carter*, 74 F.3d 138, 141, 144 (7th Cir. 1996); *Stillians v. Iowa*, 843 F.2d 276, 278-79 (8th Cir. 1988); *EEOC v. Board of Trustees*, 723 F.2d 509, 510 (6th Cir. 1983). *See* Part I(A), *infra*.

The Courts of Appeals also have split on whether a Policymaker's excluded status can be waived, and thus implicitly on whether the Policymaker Exclusion deprives the District Courts of jurisdiction. This is important, because it is integral to the remedial scheme Congress constructed in the Civil Rights Act of 1991, and because it determines whether any state-law claims of local government appointees at the policymaking level are tried in state or federal court. In this case, the Ninth Circuit concluded that the City had waived Plaintiff's status as an excluded Policymaker by not presenting the question to the jury, and thus implicitly held that the issue is not jurisdictional. Conversely, the Eighth and Sixth Circuits hold that the Policymaker Exclusion determines the District Court's subject matter jurisdiction to hear the case. *Stillians*, 843 F.2d at 278; *EEOC v. Board of Trustees*, 723 F.2d at 510. The Seventh Circuit, like the Ninth, has held the Exclusion can be waived. *Roche v. City of Chicago*, 24 F.3d 882, 886-87 (7th Cir. 1994). *See* Part I(B), *infra*.

The second set of issues this Petition raises concerns the extent to which Title VII retaliation liability may be premised on speech and conduct protected by the First Amendment. A significant part of Plaintiff's case assigned liability to the City for Councilman Campbell's and his supporters' allegedly retaliatory nondefamatory public criticisms of Plaintiff's official job performance in the local press, and for the allegedly retaliatory failures by the remaining

members of the City Council to criticize Campbell and support Plaintiff, or to censor Plaintiff's public critics. *See* Part II(A), *infra*. This important issue concerning the scope of the First Amendment's protections of public debate on matters of public concern arising in a public workplace has prompted calls from courts and commentators for the Court's guidance. *See* Part II(C), *infra*. Yet the Ninth Circuit refused to consider this question as well, asserting that the City had waived it by acquiescing in a stipulation designed to effectuate the District Court's rulings against it on its motion in limine to exclude this evidence. That ruling was simply wrong, and an abdication of the Court of Appeals' constitutional responsibility to scrutinize the record with especial vigilance when liability is imposed on potentially protected speech or conduct. *See* Part II(B), *infra*.

The Petition should be granted on each of these issues, either for the Court's resolution after full briefing, or for summary vacatur and remand with directions that the Ninth Circuit consider the issues it unjustifiably failed to decide.

I.

THERE IS A SPLIT IN THE CIRCUITS CONCERNING APPLICATION OF THE POLICYMAKER EXCLUSION TO TITLE VII.

The City argued throughout this case that the District Court lacked subject matter jurisdiction because Plaintiff's position as City Manager fell within the "Policymaker Exclusion." The District Court determined that Plaintiff's position fell outside the Policymaker Exclusion. On appeal, the City claimed that this was error. Without even acknowledging the City's contention that the question was jurisdictional, the Ninth Circuit held (1) that the question of Plaintiff's exclusion from Title VII coverage was a *factual* issue for the *jury* to resolve; and (2) that the City had waived the issue by failing to present it to the jury in either trial, and by failing to make a motion for judgment as a matter of law

at the conclusion of the second trial as it had at the conclusion of the first. App. A2.[2]

The Ninth Circuit's ruling raises serious and important legal issues on two distinct questions on which the Circuits are split (*see* Parts I(A) and (B), *infra*), and was plainly incorrect (*see* Part I(C)), *infra*).

A. The Circuits Are Split On Whether The Applicability of The Policymaker Exclusion Is A Question Of Fact For The Jury Or Of Law For The Court.

Title VII originally excluded discrimination claims against state and local governments altogether. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448-49 (1976). When Congress amended the statute in 1972 to permit actions against state and local governments, it also excluded from Title VII's definition of an "employee" covered by the statute certain elected and appointed government officials, including "appointee[s] on the policy making level" who are not "subject to the civil service laws of a state government."[3] "In exempting policy-making appointees, Congress realized the

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[2]The Ninth Circuit's entire discussion on the issue was this:

"When the district court denied the City's motion for summary judgment, the question of whether Hardin was exempt from Title VII's coverage remained an issue for the jury. The City failed to present the issue to the jury in either of its trials or to renew its motion for judgment as a matter of law at the second trial. This court lacks authority to consider the motion for judgment as a matter of law." (App. A2 (citing *Desrosiers v. Flight Int'l, Inc.*, 156 F.3d 952 (9th Cir. 1998), *Lum v. City of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992); *Basciano v. Reinecke*, 313 F.2d 542, 544 (2d Cir. 1963)))

[3]*See* Pub. L. 92-261 §2(1), 86 Stat. 103 (codified at 42 U.S.C. §2000e(a)) (term "person" includes government); Pub. L. 92-261 §2(5), 86 Stat. 103 (codified at 42 U.S.C. §2000e(f)) (excluding from term "employee" "an appointee on the policy making level" who is not "subject to the civil services laws . . . .").

necessity of allowing elected officials complete freedom in appointing those who would direct state and local departments and agencies." *EEOC Dec.* 79-08, 1978 EEOC LEXIS 25, at *2-*3 (Oct. 20, 1978).

The 1991 Civil Rights Act amended Title VII to provide litigants, for the first time, with a right to jury trial. Pub. L. 102-166 §102(c), 105 Stat. 1071, 1073 (codified at 42 U.S.C. §1981a). As part of the same legislation, Congress enacted the Government Employee Rights Act of 1991 ("GERA"), which provides appointed state and local policymakers excluded from coverage under Title VII the same substantive protections from discrimination provided for in Title VII.[4] But GERA does not grant those policymakers the right to a jury trial—or even the right to seek relief in federal court—that is provided to employees directly protected by Title VII. Instead, GERA specifies that policymakers may seek relief only from the EEOC, with judicial review (for abuse of discretion) by the Courts of Appeals. Pub. L. No. 102-166 §321, 105 Stat. 1071, 1097-98 (codified at 2 U.S.C. §§1220(b)-(d)); *compare* 42 U.S.C. §2000e-5(f)(3) *with* 2 U.S.C. §§1220(b)-(d).

The assignment of policymaking appointees' employment discrimination claims to a specialized administrative agency rather than to jury determination in a District Court reflects a legislative judgment regarding the appropriate procedure, factfinder and forum when claims of employment discrimination brought by high-level appointees may intrude upon a government's political or policymaking functions.[5]

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[4]Pub. L. No. 102-166 §§302 and 321 (later redesignated as §304), 105 Stat. 1071, 1088, 1097-98 (codified at 2 U.S.C. §§1202; 1220(a)). Initially, GERA also provided protection for Senate employees. Pub. L. No. 102-166 §§303-319, 324-325, 105 Stat. 1071, 1088-1099. That aspect of the statute was later repealed. *See* former 2 U.S.C. §§1203-1218, repealed by Pub. L. 104-1, §504(a)(2), 109 Stat. 41.

[5]*See* H.R. Rep. No. 102-40(I), at 155-56 (1991) (comparison of H.R. 1395 to the 1991 Civil Rights Act states that GERA does not permit Congressional employees to file Title VII lawsuits in federal court); 137

(continued . . .)

Thus, in holding that Plaintiff's status as a Policymaker was a factual question that the City was obligated to present to the jury on pain of waiver, the Ninth Circuit turned the statutory scheme on its head. In the Ninth Circuit's view, a defendant who claims the plaintiff is within the Policymaker Exclusion must submit to a jury the question of whether the plaintiff is entitled to a jury trial in District Court or should have presented the claims to the EEOC.

The lower courts are split on this issue. The Ninth Circuit's decision conflicts with the decisions of the Sixth, Seventh and Eighth Circuits, which have treated the applicability of the Policymaker Exclusion of Title VII and the identically worded provision in the Age Discrimination In Employment Act ("ADEA")[6] as a question of law, determining whether the individual claimant before them is an "appointee on the policy making level" solely by reference to the governing statutes and official job descriptions defining the claimant's position, without regard to whether the individual in question actually makes policy.[7]

(. . . continued)
CONG. REC. S17427-01 (Nov. 21, 1991) (comments of Sen. Nickles) (explaining rejected amendments to GERA that would have made the Senate subject to jury trials in employment discrimination cases).

[6]The Courts of Appeals have uniformly held that the Policymaker Exclusion in Title VII and the identically worded exclusion in the ADEA, 29 U.S.C. §630(f), should be construed and applied identically. *See, e.g., Tranello v. Frey*, 962 F.2d 244, 249 (2d Cir. 1992); *Monce v. City of San Diego*, 895 F.2d 560, 561 (9th Cir. 1990); *EEOC v. Reno*, 758 F.2d 581, 583-84 (11th Cir. 1985).

[7]*Americanos v. Carter*, 74 F.3d 138, 141, 144 (7th Cir. 1996) (determining Policymaker status under Title VII and ADEA on basis of statutory duties because court "must look to the 'powers inherent in a given office, rather than the actual functions the occupant of that office performed'" (citations omitted)); *Stillians*, 843 F.2d at 278-79 (facial interpretation of state law used to determine plaintiff's policymaking authority in applying ADEA's Policymaker Exclusion); *EEOC v. Board Of Trustees*, 723 F.2d 509, 510 (6th Cir. 1983) (official job description determines whether plaintiff is Policymaker under Title VII's Exclusion). *See also Stitz v. City of Eureka Springs*, 9 F. Supp. 2d 1046, 1053-54 (W.D. Ark. 1998) (because state law conferred policymaking duties upon

(continued . . .)

On the other hand, the Ninth Circuit's decision is consistent with the decisions of the Tenth Circuit and of several District Courts, which have held a plaintiff's "Policymaker" status to be a factual determination.[8]

The Ninth Circuit's decision also conflicts with decisions of the Eleventh Circuit and other Ninth Circuit panels that determine application of the comparable "personal staff" exclusion in Title VII and the ADEA[9] as a matter of law by reference to the position's defining statutes and job descriptions, rather than by examining the factual incidents of each particular employment situation.[10]

(. . . continued)
plaintiff, she was an excluded Policymaker under Title VII despite her allegations that, as a matter of fact, she was not permitted to make policy); *Butler v. New York State Dep't of Law*, 998 F. Supp. 336, 345-46 (S.D.N.Y. 1998) (Policymaker Exclusion determined from official job description or statutory description); *Lee v. Wojnaroski*, 751 F. Supp. 58, 60 (W.D. Pa. 1990) (under ADEA, court examines "statutory powers of the [plaintiff] to determine whether the post is a policymaking one. The performance or lack of performance by any given office-holder of policymaking functions is irrelevant to that determination").

[8]*Anderson v. City of Albuquerque*, 690 F.2d 796, 800-801 (10th Cir. 1982) (question of fact whether plaintiff made policy); *Schallop v. New York State Dep't of Law*, 20 F. Supp. 2d 384, 398-99 (N.D.N.Y. 1998) (examining facts to determine applicability of Policymaker Exclusion under Title VII); *Brown v. Polk County*, 811 F. Supp. 432, 437-38 (S.D. Iowa 1992) (same); *Patrick v. City of Florala*, 793 F. Supp. 301, 305 (M.D. Ala. 1992) (noting "highly factual" nature of policymaker inquiry under Title VII). Prior to 1991, questions of fact were decided by the court in Title VII cases. The more recent cases apparently did not consider the effect of the Civil Rights Act of 1991, which for the first time mandated a jury as the factfinder in Title VII cases.

[9]Under Title VII and the ADEA, a covered "employee" does not include "any person chosen by [an elected] officer to be on such officer's personal staff." 42 U.S.C. §2000e(f); 29 U.S.C. §630(f).

[10]*EEOC v. Reno*, 758 F.2d at 583 (facial reading of state law used to determine application of ADEA exclusion); *Monce v. City of San Diego*, 895 F.2d 560, 561 (9th Cir. 1990) (examining statutes to determine whether plaintiff fell within the ADEA exclusion); *Ramirez v. San Mateo County*, 639 F.2d 509, 511-13 (9th Cir. 1981) (examining state and local statutes to determine whether deputy attorney general fell within Title VII exclusion).

Conversely, the Fifth Circuit holds the application of the person staff exclusion to be factual.[11]

The decisions treating the applicability of the Policymaker Exclusion and similar exclusions as an issue of law to be determined based on the governing statute and official job description rather than on a factual inquiry regarding the claimant's actual practices in each case make the most practical sense, and best accord with the statutory language at issue. As the Court observed in construing the Policymaker Exclusion in the ADEA:

> "[I]t is far from plain that the statutory exception requires that [the employee in question] actually make policy. The statute refers to 'appointees on the policy making level,' not to 'appointees who make policy.' It may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance." (*Gregory v. Ashcroft*, 501 U.S. 452, 466-67 (1991))

Whether the subsisting confusion in the federal courts has resulted from inattention to the statute's literal wording or a deeper misunderstanding of the statutory scheme, however, the confusion is real and widespread. The Court should grant certiorari to settle the issue of whether the applicability of the Policymaker Exclusion under Title VII, and similar exclusions under other federal employment discrimination statutes, is a question of law to be resolved by the District Court or a question of fact to be determined by a jury.

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[11] *See Clark v. Tarrant County*, 798 F.2d 736, 741 (5th Cir. 1986); *Teneyuca v. Bexar*, 767 F.2d 148, 152 (5th Cir. 1985); *Calderon v. Martin County*, 639 F.2d 271, 273 (5th Cir. 1981).

B. There Is A Conflict Among The Circuits Over Whether The Policymaker Exclusion Is Jurisdictional Or Can Be Waived.

That Congress intended the Policymaker Exclusion to be jurisdictional is evident from the history and structure of the statutory scheme it created. As we have seen, Title VII provides the federal District Courts with jurisdiction to entertain covered employee's claims, but excludes Policymakers from its definition of a covered "employee." 42 U.S.C. §2000e(f). GERA separately extends Title VII's substantive rights against discrimination to policymakers excluded from Title VII, but expressly establishes a distinct forum and procedure to adjudicate and enforce those rights: a specialized administrative determination by the EEOC, reviewable in the Courts of Appeals. "[C]ongressional preclusion of judicial review [to a certain class of plaintiffs] is in effect jurisdictional . . . ." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984) (holding that a statute that permitted milk handlers but not consumers to challenge administration's establishment of milk prices deprived the court of jurisdiction over consumers' claims).

The Ninth Circuit's terse disposition of the City's appeal on grounds of waiver did not even respond to the City's argument that the Policymaker Exclusion is jurisdictional. *See* AOB 19, 22 n.13, Reply 13. Nor was the Ninth Circuit the first Court of Appeals to have found the Exclusion subject to waiver: The Seventh Circuit came to the same conclusion in *Roche v. City of Chicago*, 24 F.3d 882, 886-87 (1994). Surely neither of these Courts could have questioned the well-settled rule that a federal court's jurisdiction *must* be examined at all stages of the proceedings and can *never* be waived. The rule that federal courts have no authority in the absence of subject matter jurisdiction is so fundamental that "federal courts are under an independent obligation to examine their own jurisdiction," even when no party has raised the issue. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *see also* FED. R. CIV. P. 12(h)(3). Because "no

action of the parties can confer subject-matter jurisdiction upon a federal court . . . the consent of the parties is irrelevant, . . . [p]rinciples of estoppel do not apply, . . . and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702 (1982) (citations omitted). And a plaintiff's statutory standing to bring suit is precisely the type of jurisdictional question that can and must be raised at any time—even *sua sponte* by an appellate court. *FW/PBS*, 493 U.S. at 230-31.

The Ninth and Seventh Circuits thus must have concluded that a claimant's Policymaker status was not jurisdictional. But those rulings conflict with published decisions of the Sixth and Eighth Circuits finding the District Courts without subject matter jurisdiction to consider an excluded Policymaker's claims.[12] It likewise conflicts with decisions of the Fifth and Eleventh Circuits, and other Ninth Circuit panels, according jurisdictional force to Title VII's and the ADEA's "personal staff" exclusions.[13] The Court should grant certiorari to resolve the conflict as to whether these statutory limitations on employees' standing are non-waivable limitations on the federal District Courts' subject matter jurisdiction.

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[12] *Stillians*, 843 F.2d at 278 (ADEA's Policymaker Exclusion is jurisdictional; jurisdiction issue raised *sua sponte* by Court of Appeals); *EEOC v. Board of Trustees*, 723 F.2d 509, 510 (6th Cir. 1983) (affirming the District Court's dismissal of a Policymaker's Title VII claim for lack of subject matter jurisdiction, without expressly discussing the jurisdictional issue).

[13] *EEOC v. Reno*, 758 F.2d 581, 583 n.6 (11th Cir. 1985) (affirming dismissal of ADEA claim for lack of subject matter jurisdiction under the "personal staff" exclusion); *Monce v. City of San Diego*, 895 F.2d 560, 561 (9th Cir. 1990) (same); *Clark v. Tarrant County*, 798 F.2d 736, 748 (5th Cir. 1986) (acknowledging that Title VII's personal staff exclusion is jurisdictional).

C. The Decisions Of The Courts Below Are Clearly Erroneous.

Even if the applicability of the Policymaker Exclusion generally were a question of fact, and even if it were not a jurisdictional issue that cannot be waived, the Ninth Circuit's finding of waiver in this case was plainly wrong and precluded appellate review of an important question of federal law on which the District Court made an erroneous ruling with profound consequences for state and local governments.

The City initially raised Plaintiff's status as an excluded Policymaker, and the District Court's corresponding lack of jurisdiction, in a motion for summary judgment. The City's motion showed that Plaintiff's position satisfied both of the elements of the Exclusion: (1) Plaintiff was an "appointee on the policy making level"; and (2) she was not "subject to the civil service laws of a State government." 42 U.S.C. §2000e(f).

In denying the City's motion, the District Court made binding determinations as a matter of law on each of the two elements of the Policymaker Exclusion; as to neither element did it find any triable issue of material fact. App. A36-A38. On the first element, the District Court made an explicit finding that "[b]ecause Hardin exercised significant policymaking functions as City Manager, the Court finds that she was 'an appointee on the policymaking level' under Title VII." App. A36.[14] The District Court nonetheless denied the City's motion because it found from a facial reading of City ordinances that Plaintiff was "subject to . . . civil service laws" within the meaning of the Policymaker Exclusion. The Court reasoned that because Plaintiff's rights to such benefits as sick leave and vacation time were defined

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[14]In this the District Court was undoubtedly right. As is typical in the "city-manager" form of government Concord has adopted, the City Manager is the "administrative head of the City government"—in effect its Chief Executive Officer—who controls all city departments subject to City Council approval. CONCORD MUN. CODE §2208.

by reference to those portions of the City's laws that governed those benefits for civil service personnel, her position was subject to *some* of the City's "civil service laws," and thus outside the scope of the Policymaker Exclusion. App. A36.

The District Court's interpretation of Title VII was flatly wrong as a matter of law. An employee's status as an excluded Policymaker under Title VII "is, of course, a question of federal law, but we must look to state law" to determine whether the employee is subject to state civil service laws. *Stillians*, 843 F.2d at 279. The hallmarks of a civil service system are strong assurances of tenure, with limitations on discipline and termination; such protections typically are not extended to high-level political and policymaking appointees so that they may remain answerable to the political offices that appointed them. *Placer County Employees Ass'n v. Board of Supervisors*, 233 Cal. App. 2d 555, 558 (1965); 3 MCQUILLIN §§12.55, 12.76. As is true in thousands of municipalities throughout California and the nation, by law Concord's City Manager "hold[s] office at the pleasure of the City Council," and may be removed by the Council in the "exercise [of] its uncontrolled discretion." CAL. GOV'T CODE §36506; CONCORD MUN. CODE §2206(A), (B). Plaintiff's employment contract expressly incorporated these removal provisions. California's and the City's statutory scheme exemplifies the practically universal division prevailing under state and local law between "civil service" and "exempt" employees (*see, e.g.*, *Seidler v. Municipal Court*, 12 Cal. App. 4th 1229, 1237-38 (1993); 3 MCQUILLIN §12.76), and places the City Manager in the "exempt" category. CONCORD MUN. CODE §11304(a)(2)(2.1).[15] Indeed,

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[15]Concord's personnel system is divided into "Competitive Service" civil service positions, which are tenured upon completion of the probationary period and terminable only for specified reasons (CONCORD MUN. CODE §§11306-09); and "Exempt Service," which by its literal

(continued . . .)

the City Manager's "exempt" status is itself sufficient as a matter of law to establish that the position is not "subject to civil . . . service laws" for purposes of Title VII's Policymaker Exclusion. *Stillians*, 843 F.2d at 278.

The City unsuccessfully sought reconsideration of the District Court's erroneous decision that the City Manager was covered by the civil service laws. It later brought a motion for judgment as a matter of law on the same ground after the first trial (ER 435-39), which the District Court denied as "the same old argument" and "a motion for reconsideration, about the fourth." App. A23.

The District Court's ruling that Plaintiff was subject to civil service laws and outside the Policymaker Exclusion thus disposed of that issue for the duration of the trial court proceedings. FED. R. CIV. P. 56(d) (if the court does not resolve the entire action on a summary judgment motion, it "*shall* . . . make an order specifying the facts that appear without substantial controversy. . . . Upon the trial of the action the facts so specified shall be *deemed established*, and *the trial shall be conducted accordingly*") (emphasis added)); *Rivera-Flores v. Puerto Rico Tel. Co.*, 64 F.3d 742, 747-48 (1st Cir. 1995) (court's finding in order *denying* summary judgment constituted Rule 56(d) order resolving issue for the duration of the case). After the District Court overturned the jury's verdict in the City's favor, a pretrial order carried into

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(. . . continued)
terms is exempt from civil service restrictions (*id.* §11304). However, the benefits provisions on which the District Court improperly relied to find that Plaintiff was "subject to . . . civil service laws" *are not civil service laws at all*. The Court relied (App. A38) on a provision that subjects the City Manager to "[P]ersonnel Policy and Procedure Statements" and Council resolutions dealing with incidental personnel matters, such as benefits. CONCORD MUN. CODE §11304(b). But it is the "Personnel *Rules*"—*not* the Personnel *Policy Statements* to which the City Manager is subject—that govern "the *civil service status* of employees," including discipline, layoff and termination (*id.* §11205(a) (emphasis added))—and the Personnel *Rules* do *not* apply to "exempt" employees such as the City Manager. *Id.* §11304(b).

the second trial all its orders and rulings from the first. ER 542.[16]

On this record, it is impossible to understand how the Ninth Circuit could have found a failure to preserve the Policymaker Exclusion issue. The District Court treated the question as one of law, on undisputed facts, and definitively resolved it in ruling on the City's motion for summary judgment. Under Rule 56(d), this was therefore not a case in which the City *could* have presented the issue to the jury at trial; the issue therefore cannot have been waived by a failure to do so.[17]

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[16]The City continued to challenge the District Court's jurisdiction during the second trial. *See, e.g.*, ER 1719 Dkt. 524 at 2 (Joint Pretrial Statement: The City "disputes that this Court has subject matter jurisdiction"); ER 1719 Dkt. 519 at 10 (The City's Statement of Disputed Facts and Points of Law: Applicability of Policymaker Exclusion is a disputed point *of law*); ER 1719 Dkt. 522 at 18 (The City's Trial Brief: "This Court has no jurisdiction over Plaintiff's Title VII claims" due to the Policymaker Exclusion).

[17]The authorities the Ninth Circuit cited to justify its abdication on the issue are inapposite. Those authorities quite correctly decline to review a pretrial ruling on an issue after a trial on the merits has superseded the pretrial ruling and fully resolved the same issue. *Lum v. City of Honolulu*, 963 F.2d 1167, 1169-70 n.1 (9th Cir. 1992) "adhere[d] to the majority view that in the ordinary case where a motion for summary judgment has been denied because the trial court determined that issues of fact had to be tried, there is no useful purpose in reviewing the pretrial ruling on summary judgment after a plenary trial on the merits." But to the extent any factual questions were involved here, the District Court's Rule 56(d) findings definitively resolved them, and did *not* "determine[] that issues of fact had to be tried." *Basciano v. Reinecke*, 313 F.2d 542 (2d Cir. 1963) held that denial of a Rule 50(b) motion made after a first trial was not reviewable after a second because "plaintiff's alleged failure to put in a technically sufficient case in the first trial" should not bar his recovery because "we now know, as a result of the second trial, that his cause of action is a valid one." *Id.* at 543. Here, the Court's ruling on Plaintiff's civil service status was a legal holding that could not change based on either party's presentation in the second trial, and was made applicable to the second trial by the District Court's pretrial order. ER 542. Finally, in *Desrosiers v. Flight International, Inc.* 156 F.3d 952, 957 (9th Cir. 1998) the appellants had never brought a Rule 50 motion at all, which is not the case here.

D. Applicability Of The Policymaker Exclusion Raises Important Questions Of Federal Law Affecting State And Local Governments Nationwide.

The questions this Petition presents are not only of great practical import to the thousands of state and municipal employers nationwide, but address the delicate balance that Congress struck when it calibrated the nature and degree of the federal antidiscrimination policy's intrusion into the political and policymaking processes of state and local government. As this Court has recognized, "non-elective executive . . . officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Gregory*, 501 U.S. at 462 (citation omitted). The Policymaker Exclusion ensures that federal juries are not invited to second-guess the motives of state and local elected officials in hiring or firing their top policymaking appointees, and that federal courts do not rule on delicate political issues concerning the appointment decisions of state and local elected officials. This case is a cautionary tale of how difficult it can be for juries to distinguish the political from the unlawfully retaliatory in such policy-laden decisions: one jury found no Title VII liability at all, while a second assessed seven-figure damages for the same conduct.

As discussed above, the Ninth Circuit's erroneous decision that Plaintiff's policymaker status should have been decided by the jury, and that the City waived this jurisdictional challenge by failing to present it to that jury, highlights subsisting conflicts among the Courts of Appeal on these questions. The issues are of vital importance. If the Policymaker and similar exclusions do go to the federal courts' subject matter jurisdiction, then a dismissal under the Policymaker Exclusion deprives the federal courts of jurisdiction over any remaining state-law claims, allowing state courts to decide issues of critical importance under state law about state and local policymakers. 28 U.S.C. §1367; *Randolph v. Budget*

Rent-A-Car, 97 F.3d 319, 327 (9th Cir. 1996). Conversely, if these exclusions are considered both factual and non-jurisdictional, as the Ninth Circuit held in this case, it will vitiate Congress's carefully considered remedial scheme, including its direction that delicate political decisions concerning high-ranking state and local policymakers *not* be decided by lay juries in federal courts. The issues raised in this Petition are eminently worthy of this Court's attention. The Petition should be granted for plenary briefing and decision on the merits.

Alternatively, the Court should grant certiorari, and summarily vacate and remand to the Ninth Circuit with directions to consider and decide the issue of whether Plaintiff is within the Policyholder Exclusion. Summary reversal is particularly appropriate when federal subject matter jurisdiction is lacking (*see United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982); *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974); *Lee v. Thorton*, 420 U.S. 139 (1975) (direct appeal under Tucker Act); *Richardson v. Morris*, 409 U.S. 464 (1973) (same); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973) (same)), and is particularly appropriate here. It appears that the Ninth Circuit completely overlooked both the nonfactual and the jurisdictional nature of the City's claim that Plaintiff was an excluded Policymaker—undeniably "pertinent matters which it appears that the lower court may not have considered." *See Stutson v. United States*, 516 U.S. 193, 194 (1996). *See also Lawrence v. Chater*, 516 U.S. 163, 170 (1996) (the Court does not hesitate to reverse and remand for further consideration "where the lower court's order shows no sign of having applied the precedents that were briefed").

Moreover, even if that issue were not a jurisdictional one, the Ninth Circuit also plainly erred in holding that the City had failed to raise and preserve Plaintiff's status as an excluded Policymaker. It erroneously let stand a District Court ruling on an issue of considerable importance to state and local government. That ruling effectively eliminates the

Policymaker Exclusion for most high-ranking officials in state and local government. Most of those officials receive incidental benefits such as sick leave, vacation time and insurance, and many receive them on the terms defined for tenured civil servants. Yet few if any state or local governments consider their administrative heads part of the civil service despite the receipt of routine benefits, and most make the distinction—as the City of Concord does—between civil service and exempt employees, placing their top administrators in the exempt category. The ruling below therefore eviscerates the Policymaker Exclusion, and frustrates Congress's carefully constructed remedial scheme. The Ninth Circuit's refusal to address the merits of the Policymaker question was an error that the Court could and should correct by a summary disposition of this Petition.

II.

THE IMPOSITION OF TITLE VII LIABILITY FOR EXPRESSIVE ACTIVITY PROTECTED BY THE FIRST AMENDMENT RAISES IMPORTANT QUESTIONS OF FEDERAL LAW AND CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT.

The First Amendment precludes civil liability on any theory for "public debate about public figures" not involving false statements of fact. *Hustler Magazine v. Falwell*, 485 U.S. 46, 53, 56 (1988); *New York Times v. Sullivan*, 376 U.S. 254 (1964). Yet the District Court in this case permitted Plaintiff to persuade the jury to award seven-figure damages based on the Defendants' political speech and conduct concerning a public official on matters of public concern—activities that "ha[ve] always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citation omitted). The District Court should never have allowed Title VII's salutary goal of eliminating workplace discrimi-

nation to justify such constitutional abuse, and the Ninth Circuit should never have refused to review the error.

A. The Judgment In This Case Is Inconsistent With This Court's Decisions Protecting Public Debate On Issues Of Public Importance.

Although Plaintiff's liability case concerned a number of disputed incidents, as a practical matter it revolved around two critical sets of events: Councilman Campbell's public criticism in the press of Plaintiff's official performance as City Manager, and his alleged encouragement of his political supporters to do the same in letters to the editors of local newspapers.

From Plaintiff's letter to the City Council resigning her position as City Manager, to her Complaint initiating this action, to her own testimony and examination of virtually every other witness in two trials, to her closing argument, Plaintiff asserted in inflammatory and emotional terms that Campbell had violated Title VII by undertaking these activities as a means of retaliating against Plaintiff's exposure of his harassment of City staff. *E.g.*, ER 25, 106, 118, 977-79, 1106, 1114-16, 1281-82, 1290-94, 1305-6, 1506-9, 1566-69, 1573-74, 2067-69, 2267. The City, she argued, thus was vicariously liable for Campbell's retaliation. But Campbell, and the letter writers, undeniably had a constitutional right to speak out on these issues. *E.g.*, *Falwell*, 485 U.S. at 51. And the First Amendment's rights of free expression and association equally protected Campbell's "opportunity to persuade [others] to action." *Claiborne Hardware*, 458 U.S. at 910 (citation omitted). Nor was it constitutionally permissible to inquire into Campbell's motives—or those of the letter-writers—for speaking out. The exercise of First Amendment rights "cannot properly be made to depend on

the[] intent in doing so." *Id.* at 913 (citation omitted).[18] Yet Plaintiff's case depended not just on showing that Campbell did these things, but that he did them *specifically for the purpose of retaliating against her*.

Even more offensive to the First Amendment were Plaintiff's successful efforts to convince the jury that the City Council's failure to publicly disagree with the Mayor or to praise Plaintiff's job performance, and its refusal to "investigate" and "put a stop to" the letters to the press critical of her official performance were in retaliation for her exposure of Campbell's harassment. This, she successfully argued, constituted the City's own direct violation of Title VII. *See, e.g.*, App. A79. But the City Council members had an absolute constitutional right *not* to speak. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Nor was it proper to subject the City to Title VII liability for having refused Plaintiff's demand that it use its police powers to investigate and censor her political critics.[19]

If these events had involved *private* parties and a *private* employer, Plaintiff's contentions very well might have been

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[18]*See also R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (city ordinance criminalizing speech pertaining to race, religion or gender likely to arouse anger was unconstitutional content discrimination); *Falwell*, 485 U.S. at 53 ("even when a speaker or writer is motivated by hatred or ill-will his expression [is] protected by the First Amendment"). A rule that would allow examination of speakers' "true" motivations and only protect speech animated by government-approved sentiments would be a pernicious invitation to censorship. *E.g.*, *id.* ("Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred" (citation omitted)).

[19]Nor did Hardin's distress at the public criticism to which she was being subjected, however genuine, have any proper place in this case. The "sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office." *Falwell*, 485 U.S. at 53. And "[c]riticism of . . . official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes . . . official[s'] reputations." *New York Times*, 376 U.S. at 273.

proper. But what Plaintiff steadfastly refused to confront, and apparently persuaded the District Court to overlook, was that she was a high-level *public official* and the employer-defendant in this case was a *government*. In this context, a public official must be prevented from misusing the powerful tools Congress forged to combat workplace discrimination to shape the contours of a public political debate to her liking.[20]

B. The Ninth Circuit Unjustifiably Refused To Address These Questions.

Although these issues were fully briefed and argued below, the Ninth Circuit declined to address them:

> "Finally, the City argues that admission of stipulated evidence regarding bad publicity [Plaintiff] alleged that the mayor initiated in retaliation for her exercising her Title VII rights violated the mayor's first amendment political speech rights and prevents its vicarious liability. The City waived this issue when it stipulated to admission of the evidence and failed to challenge admission of the evidence as a violation of First Amendment freedom of speech." (App. A3-A4)

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[20]The City does not claim it would have been error to allow Plaintiff to predicate liability on any knowingly false statement of *fact* about her; there are no such statements at issue here given the first jury's verdict against her on her defamation claim against Campbell, a verdict she has not appealed. ER 461, 1709. Moreover, nothing the City argues here would limit a plaintiff's remedies for a wide range of wrongful conduct that is not protected by the First Amendment. For example, the ruling the City seeks would not preclude liability for any of the most common acts of discrimination or harassment, because claims among private actors in the private sector generally do not involve public or official discourse on matters of public importance. Moreover, nothing this Court decides here should limit the assertion of harassment or discrimination claims by public employees, except to the limited extent that such claims are based on the public or official discourse of government officials on matters of public or political importance.

This is an unfair and inaccurate reading of the record and the law. At the outset of the first trial, the Defendants moved in limine on a number of grounds to preclude proof or argument concerning the letters to the editor critical of Plaintiff that she contended Campbell had instigated. App. A68, A81, A83, A85, A90. Among other things, this motion sought to preclude any reference to a purported "hostile" letter-writing "campaign," or any other term that "improperly presume[d] or implie[d]" efforts by Campbell or local citizens not "in the normal exercise of their First Amendment rights," both associational and expressive. App. A92.

This motion in limine was sufficient to preserve the issue for appeal without further contemporaneous objection at trial. *Government of Virgin Islands v. Joseph*, 964 F.2d 1380, 1384-85 (3d Cir. 1992); *United States v. Wood*, 943 F.2d 1048, 1054-55 (9th Cir. 1991). Nevertheless, Defendants raised the issue once more during trial:

> "[To charge Campbell with] instigating a hostile letter writing campaign, I think it violates Mr. Campbell's First Amendment rights—I think it also potentially violates these other peoples' rights." (App. A75)[21]

The District Court denied Defendants' motions in limine, and rejected Defendants' arguments that this evidence be excluded. App. A29. It imposed cumulativeness limitations on the number of letters (and authoring witnesses) it would allow, but made clear it would permit evidence and argument concerning Campbell's role in encouraging the letters and the City's knowledge of them. App. A24. In the face of this adverse ruling, the Defendants entered into a stipulation effectuating the District Court's ruling. App. A60. In pre-

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[21]Campbell's counsel raised this objection. App. A75. The ground rules at trial provided that an evidentiary objection by one Defendant would be deemed an objection by both. ER 822.

senting that stipulation to the Court, Defendants' counsel took pains

> "to make clear for the record, we're not waiving any of our prior objections regarding those letters, but at your honor's request, we've attempted to craft a stipulation that . . . meets what your honor has directed us to do." (App. A65)[22]

Contrary to the Ninth Circuit's suggestion, this stipulation waived no objection: The law and common sense confirm that acquiescing in a court-directed stipulation designed to effectuate an adverse ruling *cannot* waive the party's stated objection to that ruling.[23] Here, Defendants expressly *presented* and *preserved* their prior objections.

The Ninth Circuit's refusal to address the City's First Amendment defenses is particularly surprising in light of the Court's decisions imposing an especially vigilant standard of review when liability has been predicated on protected speech or conduct. The First Amendment establishes "a rule of federal constitutional law" requiring "independent appellate review" of the entire record. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510-11 (1983). The constitutional values at stake "impose[] a special obligation on [a reviewing court] to examine critically the basis on which liability was imposed" (*Claiborne Hardware*, 458 U.S. at 915 (footnote

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[22]The court's prior rulings carried over to the second trial. ER 542. Defendants preserved their objections in the second trial through a motion in limine to maintain this stipulation and have the matter addressed the same way as in the first trial (App. A55) when Plaintiff suggested her proof might deviate from it in the second trial.

[23]*See United States v. Ash*, 461 F.2d 92, 97 n. 6 (D.C. Cir. 1972), *rev'd other grounds*, 413 U.S. 300 (1973) (once court has ruled that evidence is admissible, stipulation to admission of evidence does not waive original objection); *see also United States v. Riley*, 657 F.2d 1377, 1380 n.3 (8th Cir. 1981) (defendant did not waive objection to evidence by agreeing that evidence could be sent to the jury during deliberations after court had already overruled prior objections to the admissibility of the evidence).

omitted)), and conduct its own "independent examination of the whole record" to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression" (*Bose*, 446 U.S. at 499 (citation omitted); *Claiborne Hardware*, 458 U.S. at 916 n.50). Reversal is *required* if the jury *could have* based Campbell's or the City's liability on protected speech or conduct. *Claiborne Hardware*, 458 U.S. at 924 (reversing where the trial court *may* have assessed liability for some instances of protected speech); *New York Times*, 376 U.S. at 284 (uncertainty as to whether damages were constitutionally awarded compels reversal). *See generally* Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009, 1021 (1996) ("independent judgment review is especially appropriate in harassment cases"). Given the heightened standard of review constitutionally required, the Ninth Circuit should have been loath to find First Amendment protections waived, especially in the face of a record like this one in which the speakers directly and explicitly brought the issue to the trial and appellate courts' attention.

C. The First Amendment Limitations On The Title VII Liability Of Public Entities And Public Officials Asserted Here Raise Important Questions Of Federal Law Affecting State And Local Governments Nationwide.

The First Amendment limitations on the Title VII liability of public entities and public officials that the City urges here are essential to the integrity of local democratic processes. Defining the precise contours of those constitutional limitations is a matter of great and national import. Distinguished state and federal judges and legal commentators have stressed these issues' importance and urged this Court's guidance on the intersection of Title VII and the First Amendment:

> "Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech . . . . Whether such applications of Title VII are necessarily unconstitutional has not yet been fully explored. The Supreme Court's offhand pronouncements are unilluminating. (*DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 597 (5th Cir. 1995) (citations omitted))

See also United States v. X-Citement Video, Inc., 982 F.2d 1285, 1296 n.7 (9th Cir. 1992) (*Kozinski, J., dissenting*), *rev'd*, 513 U.S. 64 (1994) ("Because First Amendment defenses were rarely raised, harassment law evolved with little concern for free speech, and some workplace harassment cases seem suspect on First Amendment grounds"); *see also* Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992); Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991). The same concerns are raised in this case by the assessment of Title VII retaliation liability based solely on public speech and expressive conduct on matters of public concern. *E.g., Bain v. City of Springfield*, 678 N.E.2d 155, 161 (Mass. 1997) ("What we most emphatically cannot countenance as an instance of retaliation is the mayor's response in the local newspaper to the charges against him. . . . The interest in remedying discrimination is weighty but not so weighty as to justify what amounts to a restriction on core political speech").

For these reasons, the Court should grant certiorari to consider the important First Amendment issues this case raises. Alternatively, the Court should grant the Petition, summarily vacate the decision below and order the Ninth

Circuit to decide the First Amendment issue on its merits. *See* Part I(D), *supra*.

CONCLUSION

For all of the foregoing reasons, the Court should grant the instant Petition, and either entertain the important issues raised herein, or alternatively summarily vacate the Ninth Circuit's decision, and remand with instructions to decide the jurisdictional and First Amendment issues the Ninth Circuit declined to consider before.

DATED: March 8, 1999.

Respectfully,

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